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No. 84-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving the free exercise of religion. The League's objective is to further each person's right to freely exercise their religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

A member of the Armed Forces, who has followed the commands of his religion, has been ordered to discontinue the religious practice of wearing a yarmulke or face several adverse consequences. This religious practice has been sincerely followed since childhood, including several years of military service. The military claims its interest in enforcement of regulations "for the sake of enforcement" is of more importance than the free exercise of religion and constitutes a compelling state interest justifying an imposition on this free religious exercise. However, the interest expressed by the military does not reach the compelling standard necessary to justify a burden placed upon any person's religion, even that of a member of the Armed Services.

ARGUMENT

I.

THE JUDICIARY CAN AND SHOULD ENFORCE THE RIGHT TO FREE EXERCISE OF RELIGION IN THE MILITARY.

This Court has given "great deference" to the decisions of Congress concerning the military, noting the general lack of judicial competency on this topic. *Rostker v. Goldberg,* 453 U.S. 57, 64-65 (1981). Congress, however, cannot disregard the Constitution simply because it acts under the title of military affairs. *Id.* at 67. Congressional acts in this realm remain subject to constitutional review, although tests and limitations may be applied in a different manner. *Id.* First Amendment protections, including the right to free exercise of religion, are still guaranteed to the members of the military, *Parker v. Levy,* 417 U.S. 733, 758 (1974), who may enforce their constitutional rights through the civilian court system. *Chappell v. Wallace,* 462 U.S. 296, 304 (1983).

The right to the free exercise of religion has been "zealously protected" by this Court, at times at the expense of other interests of high social importance. *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972). This Court has also observed that this

right has been accommodated in a military setting. Government facilities are utilized by military personnel for practicing their faiths, *School District v. Schempp,* 374 U.S. 203, 226 n.10 (1963), and chaplains are provided for the spiritual benefit of those in uniform by all branches of the Armed Services. *Id.* at 296, (Brennan, J., concurring).

II.

DESPITE THE UNITED STATES AIR FORCE REGULATIONS, A PERSON'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE ONE'S RELIGION MUST BE ACCOMMODATED.

The constitutional protection accorded to free exercise of religion means that no state action can burden one's religious liberty unless it is shown that it is the least restrictive means of achieving a compelling state interest. *Thomas v. Review Board,* 450 U.S. 707, 718 (1981); *Sherbert v. Verner,* 374 U.S. 398, 403 (1963). As this Court observed in *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972): "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Therefore, only in a very rare instance will a religious practice be forbidden entirely. This legal framework is a necessary expression of the value the Constitution places on protecting religious freedom from arbitrary governmental interference and should be followed in this case.

When a governmental action places a person in the precarious position of choosing between fidelity to one's sincerely held religious beliefs and one's employment there is a substantial burden upon religion. *Thomas,* 450 U.S. at 717-18. This type of burden is found in this case. There is no doubt as to the sincerity of Goldman's religious convictions. *Goldman v. Secretary of Defense,* 734 F.2d 1531, 1537 (D.C. Cir. 1984). Those religious beliefs require that he keep his head covered at all times. He has faithfully followed these beliefs since childhood by wearing a yarmulke. *Goldman,* 734 F.2d at 1532. This practice continued, without incident, dur-

ing several years of military service. *Goldman v. Secretary of Defense,* 739 F.2d 657, 658 (D.C. Cir. 1984) (Starr, Circuit Judge, dissenting.) Clearly, Goldman's religious liberty was burdened when he was reprimanded, warned of subjection to court-martial and received a negative recommendation for continued active service as the result of his religiously motivated decision to wear a yarmulke.

While there is a valid governmental interest in maintaining discipline in the armed services, it is not sufficiently compelling to justify the burden on free exercise of religion imposed in this case. There does not appear to have been a showing that permission for Goldman to wear a yarmulke would cause either serious disruption of discipline or a barrage of requests for exceptions to the Air Force regulations. The court of appeals, thus, seems to have rested its finding of a compelling governmental interest solely on the importance of enforcement of the regulations "for the sake of enforcement." *Goldman,* 734 F.2d at 1541. The court accepted the Air Force's rationale that any exception from its arbitrary rules to accommodate religious scruples would incur resentment from others and would interfere with the reflexive obedience necessary for the Air Force's function. *Id.*

The primary difficulty with the appellate court's position, however, is its unwillingness to make any real examination of the validity of this rationale. When free exercise of religion is burdened there should be at least some serious objective study of the validity of the rationale. Total deference to military judgment, in effect, destroys any protection of religious practice in the military. Although the appellate court was very probably correct in according lesser deference to a decision delegated to the military than to a congressional decision relating to the military, amicus submits that the appellate court failed to properly apply this standard of lesser deference. The result was that the appellate court did not appropriately carry out its judicial duty not to "abdicate [its] responsibility to review the constitutional challenge." *Goldman,* 734 F.2d at 1539. The absence of serious application of the appellate court's own standard of review is best

illustrated by Judge Starr's vehement dissent to the court's order denying rehearing, which challenged the Air Force's rationale on the basis of common sense as well as Goldman's proffered expert testimony. Judge Starr noted that: "[r]easonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets." *Goldman,* 739 F.2d at 659. Given the fact that some accommodation of religious practice is permitted, there is not the need for an "exceptionless" system which justified the imposition on free exercise of religion in *United States v. Lee,* 455 U.S. 252, 259-260 (1982). If rules can accommodate religion, it would seem that the military could as effectively enforce a rule not burdening religion as it could the present arbitrary rule. Thus, when the government's interest is properly evaluated, there does not appear to exist a governmental interest sufficiently compelling to outweigh Goldman's right to free exercise of religion.[1]

CONCLUSION

Because the Air Force's practice denying Goldman the right to wear a yarmulke burdens Goldman's religious practice and is not the least restrictive alternative to accomplish

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[1] The other lower court cases on the permissibility of restrictions on the wearing of yarmulkes do not suitably resolve this issue. Both *Menora v. Illinois High School Association,* 683 F.2d 1030, 1033-34 (7th Cir. 1982) and *Bitterman v. Secretary of Defense,* 553 F. Supp. 719, 725 (D.D.C. 1982) involve situations in which the respective courts improperly made independent interpretations of Jewish religious practice rather than appropriately focusing upon the interpretation of the individual whose religious practices were burdened. These decisions conflict with the policy underlying this Court's pronouncement in *Thomas,* 450 U.S. at 716, that "it is not within the judicial function or judicial competence to inquire whether [one member of a faith] more correctly perceived the commands of their common faith [than another member]."

a compelling governmental interest, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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